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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 795.

UREY WOODSON, as Alien Property Custodian of the United States, and W. A. JULIAN, as Treasurer of the United States,

Petitioners,

v.

DEUTSCHE GOLD UND SILBER SCHEIDENSTALT VORMALS ROESSLER, a Corporation, Frankfurt a/Main, Germany,

Respondent.

BRIEF FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners,

v.

DEUTSCHE GOLD UND SILBER SCHEIDENSTALT VORMALS ROESSLER, a Corporation, Frankfurt a/Main, Germany,

Respondent.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The Supreme Court of the District of Columbia rendered no written opinion. The opinion of the Court of Appeals, District of Columbia, is reported in 68 F. (2d) 391, and may also be found in LXI Washington Law Reporter, p. 896.

Jurisdiction.

The decree of the court below was entered November 20, 1933 (R. 109). The petition for writ of certiorari was filed

February 7, 1934, and was granted March 19, 1934 (R. 113). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether or not the Alien Property Custodian was authorized under the Trading with the Enemy Act, as amended, to deduct and retain from seized property of a former enemy, to cover administration expenses, an amount computed at a fixed percentage applicable alike to the property of all other similar claimants and bearing no relation to the actual and necessary cost of the work done or services performed in securing the possession, collection or control of the particular claimant's property or in protecting or administering the same.

2. Whether the Independent Offices Appropriation Act of 1935, passed over the veto of the President March 28, 1934, precludes recovery by the respondent of so much of the administration fees previously deducted and withheld by the Alien Property Custodian as shall be found to have exceeded the necessary expenses incurred in securing the possession, collection or control or in protecting or administering the property of the respondent and Holzverkohlungs Industrie Aktiengesellschaft.

Statutes Involved.

The statutes involved are set forth in Appendix A, hereto.

Statement.

While the facts as stated in the petition are correctly stated so far as they go, there are certain other facts to which we desire to call the Court's attention. Also, in some instances it is believed that a slight elaboration of the facts stated may be helpful.

In originally securing the possession, collection and control of the property of the respondent and Holzverkohlungs

Industrie Aktiengesellschaft, hereinafter referred to as Hiag, and in protecting and administering the same, the Custodian had actually paid out by way of fees, commissions, costs, attorneys' fees, etc., $40,251.74 in so far as the property owned by the respondent was concerned, and $13,608.12 in so far as the property owned by Hiag was concerned (R. 9), a total of $53,859.86. These expenses are detailed in Exhibits A and B, respectively, to the petitioners' answer (R. 27-29). The amount of these expenditures the respondent is not seeking to recover in this suit (R. 9). In passing, it is important to note that these actual expenses regarded as necessary by the Custodian were charged against, and were paid out of, the properties contained in the specific trusts of the two claimants in the amounts actually incurred and were not charged against the general administration costs of the Custodian's office. In principle this feature was dealt with in the manner which we contend herein was proper and should have been followed in the case of all other expenses incurred.

When property was released to the respondent and Hiag under the Winslow Act of 1923 and the Settlement of War Claims Act of 1928 there were deducted 1% and 2% administration fees. From the property of the respondent there had been retained and withheld at the time this suit was instituted, as purporting to represent 1% and 2% administration fees, $39,599, and from the property of Hiag the amount of $20,747.52, in the aggregate $60,346.52 (R. 10). The record erroneously totals these amounts as $260,346.52 (R. 10).

In addition thereto the Custodian also deducted from Treasury interest earned after March 4, 1923, by the respondent's invested cash, the sum of $5,841.70, and from the Treasury interest earned by Hiag's invested cash $2,300.61, a total of $8,142.31 (R. 11). These amounts were deducted by the Custodian on the Treasury interest as received by him, first at the rate of 1% and later at the

rate of 2% (R. 11). This seems to have represented a secret deduction which was never communicated by statement or otherwise to the respondent or Hiag by either the Treasurer of the United States or the Alien Property Custodian, and only in or about the year 1932 was discovered by counsel for the respondent (R. 11), after the original bill had been filed to recover the amounts at that time known to have been deducted and retained in connection with releases under the Winslow and War Claims Acts.

These amounts so retained and withheld were deposited by the Custodian either in his account with the Treasury Department or in a special fund then kept at the Commercial National Bank, Washington, D. C. (R. 12). From these two funds were deducted the running expenses of the Custodian's office, and also amounts to pay to American, neutral and allied nationals the amounts of administration fees which had previously been improperly charged against, and deducted from, their erroneously-seized property (R. 4 and 5). As of December 31, 1930, the aggregate of the two funds amounted to $4,143,573.27 (R. 5); as of December 31, 1931, they amounted to $4,148,396.53 (Annual Report of the Alien Property Custodian for 1931); as of December 31, 1932, they amounted to $4,124,238.23 (Annual Report of the Alien Property Custodian for 1932); and as of December 31, 1933, this fund held solely in the Treasury amounted to $4,035,614.05 (Annual Report of the Alien Property Custodian for 1933).

It appears that in 1923 all of the seized shares of stock belonging to the respondent and Hiag were actually converted into cash (R. 27-29), so that after that period virtually the only services rendered by the offices of the Custodian and Treasurer of the United States were to deposit the cash in an account with the Treasury Department, to receive Treasury interest therefrom (R. 11), and finally to release to the claimants in cash the amounts determined to be due them after such auditing, etc., as might be necessary in that connection.

The respondent by its bill, as amended, sought recovery under the Trading with the Enemy Act, as amended, of the amounts which it claims were illegally withheld and deducted from its property and that of Hiag — namely $69,888.83 plus interest, made up as follows:

	Respondent	*Hiag*	*Total*
Winslow Act	$700.00	$700.00	$1,400.00
War Claims Act	39,599.00	20,747.52	60,346.52
Undisclosed commissions on Treasury interest	5,841.70	2,300.00	8,142.31
Total			$69,888.83

(R. 10 and 11)

By its bill, as amended, the respondent prayed for an accounting, the appointment of a receiver and other equitable remedies (R. 7 and 8).

Summary of Argument.

I.

The Alien Property Custodian was not authorized under the Trading with the Enemy Act, as from time to time amended, to deduct and retain from property seized from a former enemy under the guise of administration expenses, an amount computed at a fixed percentage applicable alike to the property of all other similar claimants and bearing no relation to the actual and necessary cost of the work done or services performed in securing the possession, collection or control of the particular claimant's property or in protecting or administering the same. This Court has already held in *Escher* v. *Woods*, 281 U. S. 379 (1930), that the directions of Section 24 of the Trading with the Enemy Act as amended are explicit that the expenses chargeable against a given property are those incurred in getting or protecting it, or other property due to the same owner. In other words, each property should bear its own necessary

costs. Hence it follows that any flat-rate charges deducted from the property of any claimant without reference to the necessary expenses incurred are illegal. The statute being clear on this, no practice contrary to the explicit directions of the statute is relevant.

II.

The Independent Offices Appropriation Act for 1935, passed over the veto of the President March 28, 1934, does not deprive the courts of jurisdiction to enter judgment in favor of the respondent in this case. Congress cannot validly and constitutionally deprive former alien enemies of property rights hitherto vested in them. This is not a suit against the United States; but, even if it were so regarded, the statute would be unconstitutional as applied to the facts of this case. By statutory ratification of prior illegal deductions Congress cannot validly and constitutionally deprive respondent of its property or take it without just compensation.

Argument.

I.

The primary point involved in this case has already been definitely settled by this Court.

By Section 24 of the Trading with the Enemy Act, 12 Stat. 1511, 1516, the Custodian "is authorized * * * to pay the necessary expenses incurred by him * * * in securing the possession, collection or control * * * or in protecting or administering" the seized property. While this language is clear in authorizing the Custodian to deduct only the "necessary expenses" incurred by him in connection with the management of specific property, he assumed it to mean that he could in all cases make the same flat-rate deduction as an administration expense irrespective of the simplicity or complexity of the cases or the necessity for the deduction. This interpretation by the Custodian was declared to

be erroneous by this Court in the case of *Escher* v. *Woods*, 281 U. S. 379 (1930). In that case, to which we shall hereafter refer as the *Escher* case, brought by a Swiss citizen for the recovery of administration fees deducted and withheld, this Court speaking through Mr. Justice Holmes, at pages 383, 384 and 385, said:

> "To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, §12, 40 Stat. 411, 423, amended by Act of March 28, 1918, c. 28, 40 Stat. 459, 460 (50 U. S. C. A. Appendix §12), by which the Alien Property Custodian is 'vested with all of the powers of a common-law trustee' in respect of all property, 'other than money,' received by him under the Act and may exercise any powers appurtenant thereto 'as though he were the absolute owner thereof.' They also invoke Executive Order February 26, 1918 (No. 2813) that the Custodian 'may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property * * * and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.' Also Order of July 16, 1918 (No. 2916), of which it is necessary to mention only the direction that the expenses 'shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which' the expenses shall have arisen provided that if the property or assets of the business are insufficient, they may be satisfied out of other property 'received from, or as the property of, the same enemy.' Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding §24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other property of the same person, 42 Stat. 1511, 1516 (50 U. S. C. A. Appendix §24); and May 16, 1928, c. 580, 45 Stat. 573, 574, that 'all expenses of the office * * * including compen-

sation of the Alien Property Custodian * * * shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.' It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

"*We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary, the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner.* But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm." (Italics ours.)

It is evident, as alleged in the bill, as amended, that in making the flat rate deductions for administration expenses applicable alike to all former enemy claimants irrespective of the simplicity or complexity of the administration of their property, the Alien Property Custodian has treated former enemy property in his hands as one great trust to be called on to bear the 'expenses' of administration as one homogeneous whole (R. 6), exactly contrary to the determination of this Court as above quoted.

The petitioners urge that, this Court having decided the *Escher* case on two grounds, the second of which was sufficient to support the decision, should now reverse the first ground of its decision.

In the instant case the Court of Appeals, after discussing the *Escher* case and quoting from the decision of this Court, concluded its opinion by stating:

> "Whatever may have been the practice of the Alien Property Custodian in making flat-rate deductions for administrative expenses applicable alike to all enemy claims, irrespective of the simplicity or complexity of the administration of their property, the action of the Custodian in treating all enemy property as a single trust, to bear the expense of administration as one homogeneous whole, is clearly contrary to the holding of the Supreme Court in the above case."

This opinion without further comment on our part would seem to sufficiently answer the point urged by the petitioners, namely, that a practice of flat-rate deductions had grown up in the Custodian's office; and that Congress had by subsequent amendments of the Trading with the Enemy Act, and the Independent Offices Appropriation Acts ratified such practice so as to make such practice determinative of the meaning of the language of Section 24. Such practice might be an element to be considered in determining the meaning of an ambiguous statute, but this Court has already determined the meaning of the statute free from any ambiguity.

It is a rule beyond doubt that even long-continued administrative interpretation of a statute, though the statute has been amended and reenacted by Congress without change, will not prevail where such interpretation is manifestly incorrect. *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740 (1930); *Merritt* v. *Cameron*, 137 U. S. 542 (1890); *United States* v. *Tanner*, 147 U. S. 661 (1893); *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269 (1928); *Norwegian Nitrogen Products* v. *United States*, 288 U. S. 294 (1933)—and cases cited. The cases cited by the petitioners carefully distinguish and recognize this principle. Therefore, it seems to us that any reference to the practice is entirely beside the point. The Court had before it in the

Escher case all of the Executive orders, all the provisions of the Trading with the Enemy Act, as amended, and all of the Independent Offices Appropriation Acts now urged as supporting an allegedly recognized practice. The *Escher* case was decided in 1930. But even in his practice the Custodian has not been totally consistent, for he has charged against the trusts of the two claimants, and not against the general administration fund, $53,859.86 (R. 9) as necessarily incurred expenses the amounts of fees, commissions, costs, attorneys' fees, etc., not here sought to be recovered, and then on the other hand has imposed on top of that 1% and 2% deductions without reference to actual or necessary cost.

However, unless this Court expressly reverses the first ground of its decision in the *Escher* case, above quoted, the primary question here presented, we submit, must be considered as finally and definitely settled by that decision.

II.

The Independent Offices Appropriation Act for 1935 does not deprive the courts of jurisdiction to enter judgment in favor of respondent.

Since this case was decided by the Court of Appeals, District of Columbia, and in fact since *certiorari* was granted by this Court, there was passed over the veto of the President the Independent Offices Appropriation Act for the fiscal year ending June 30, 1935 (Public No. 141) containing the following provision:

> "No claim shall be filed * * * nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, * * * nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter

made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, * * *."

It is naturally contended by the petitioners that this Act prohibits the rendition of any judgment in favor of the respondent in this case. While no doubt designed to prohibit the maintenance of this and other similar suits now pending in the courts, this Act is ineffective to accomplish any such aims. At best it represents an unfair and unconstitutional attempt to abolish by intervening retrospective statute a right which the courts below have held to exist in these aliens who are former enemies. Certain it is that intervening legislation interfering with orderly litigation should not be looked upon with favor and particularly where it is enacted for the sole purpose of depriving our former enemies of rights held by courts to exist in their favor under prior carefully-considered legislation.

It is urged by the petitioners that the Independent Offices Appropriation Act for 1935 *pro tanto* repeals Section 9(c) of the Trading with the Enemy Act whereby any person entitled to recover property under Section 9(b), which was extended to include former enemies, might bring suit to recover property if the same were not returned to them. In view of the fact, as we will show, that the new legislation results in the deprivation and taking of property contrary to the provisions of the Fifth Amendment of the Constitution, this new legislation is of no force and effect whatsoever. Accordingly, there is no repeal *pro tanto* of Section 9(c). However, even if the procedural feature could be separated from the ratification feature and upheld as valid where suit was properly commenced long ago, it would nevertheless follow that the present suit could still be maintained, if not under Section 9(c), then under the general equity jurisdiction of the court. *Amy v. Supervisors*, 78 U. S. 136 (1871). In filing this suit, the respondent in-

voked not only the statutory special jurisdiction of the court but the general equity jurisdiction as well. (R. 2.)

While not urging strongly that the Treaty of Berlin proclaimed November 14, 1921, (42 Stat. Pt. 2, 1939, 1943) would in any event bar this suit, the petitioners in foot-note 3 on page 16 of their brief refer to the provisions of this treaty as ratifying every action taken or to be taken with respect to the seized property, including deductions and expenses. Despite the fact that the Trading with the Enemy Act had been five times amended[1] since the proclamation of the treaty and the right to sue had been preserved thereby, it was vigorously urged in the courts below that the provisions of the treaty forbade former alien enemies from prosecuting suits of this type, which are suits for unreturned property. In each instance the court rendered a determination favorable to the respondent. While it is quite apparent from the treaty itself that it was not intended to cover any such situation as here presented, the subsequent amendments of the Trading with the Enemy Act preserving the right to sue would in any instance be compelling. *The Cherokee Tobacco*, 11 Wall. 616 (1871); *United Shoe Mach. Co.* v. *Duplessis Shoe Mach. Co.*, 155 Fed. 842 (C. C. A. 1st, 1907). See also *United States* v. *Yuginovich*, 256 U. S. 450 (1921); *United States* v. *Tiger*, 19 F. (2d) 35 (C. C. A. 8th, 1927).

1. THIS SUIT IS NOT A SUIT AGAINST THE UNITED STATES.

This action is not in any sense an action against the United States. The government is not a party to the suit nor does it have any interest in it. The petitioners cite at page 45 of their brief the case of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591 (1924) and that of *von Bruning* v.

[1] The amendments to the Trading with the Enemy Act above referred to are as follows: December 21, 1921, 42 Stat. 351; December 27, 1922, 42 Stat. 1065; March 4, 1923, 42 Stat. 1511; May 7, 1926, 44 Stat. 406; and March 10, 1928, 45 Stat. 254.

Sutherland, 29 F. (2d) 631 (App. D. C. 1928) for the categorical proposition that any suit against the Custodian is one against the United States. There is no such general rule and the cases cited are not authority for any such rule. The *Banco Mexicano* case involved a suit by the liquidators of the Mexican bank against the Alien Property Custodian to recover the amount of a debt owed to that bank by the Deutsche Bank, certain assets of which held by Guaranty Trust Company had been seized and taken over by the Alien Property Custodian. There was no question but that the Custodian in seizing and holding the property was acting entirely within the scope of his authority under the Trading with the Enemy Act. Furthermore, the United States had at that time an undetermined interest in the property. Section 12 of the Trading with the Enemy Act, even as originally adopted, provided that—

> "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, *shall be settled as Congress shall direct* * * *." (Italics ours.)

The government, therefore, had taken a definite control and authority over the property until later it directed its disposition, which it had not done at the time the suit was brought. Furthermore, and this is the main point of the case, the debt sued upon did not arise with reference to the money or property held by the Custodian, and in the seized property the Mexican bank had no vested or other interest.

The *von Bruning* case involved an action by a former alien enemy against the Alien Property Custodian to recover for rent and damages to a house properly seized by the Alien Property Custodian and used as an office by him during 1918-1920. The Alien Property Custodian in occupying the house was clearly acting as agent of the United States. And, also, from all that appears from the case, he was acting within the scope of his authority. This case

did not involve the right of recovery of seized property and damages, a right to which was not covered by statute. The case may, therefore, in these respects be clearly distinguished from the instant case. The *Banco Mexicano* and the *von Bruning* cases are thus fundamentally different from the instant case and can not be considered as authority in the present action.

There are three reasons, any one of which, entirely independently of the others, necessitates the conclusion that the present action is not one against the United States. They are as follows:

(a). *The Alien Property Custodian no longer holds the moneys, for the return of which this suit is brought, as an agent of the United States, but now holds such moneys for the exclusive benefit of the respondent.* The capacity of the Alien Property Custodian was definitely changed by the amendment to the Trading with the Enemy Act approved March 4, 1923, known as the Winslow Act, and by the Settlement of War Claims Act of 1928, in so far as that capacity relates to property, of which return is authorized by those Acts.

Section 12 of the Trading with the Enemy Act, among other things, vests the Alien Property Custodian with the powers of a trustee. The language of the section is as follows:

> "The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, * * *."

The property which came into his possession in this instance was stock. The Custodian, therefore, held the stock and later the proceeds thereof upon its sale, as a trustee. As hereinafter shown, prior to the Winslow Act of 1923,

and the Settlement of War Claims Act of 1928, the beneficiary of the property was the alien owner, but the full control and power of ultimate disposition was at least conditionally in the United States. On the enactment of these statutes, however, the United States relinquished its power of disposition over the property. It ceased to have any interest therein, for by the War Claims Act it set aside the seized property for the former enemy owners. They were given the right to immediate possession of their property upon submitting proper proof of ownership and consent to the 20% temporary withholding. From their property the Custodian was authorized to withhold only 20% (temporarily), taxes, and the amount of "necessary expenses". While it seems clear that upon the enactment of the War Claims Act on March 10, 1928, the United States gave up all its interest in the seized property, certain it is that the property of respective claimants revested in them not later than the dates of allowance of their claims. The bill, as amended, shows the claims here involved were allowed and the release of the claimants' property commenced early in 1929 (R. 3 and 4). By this suit the respondent is endeavoring to recover the balance of its property in which it has a definite vested interest.

From the early days of the custodianship of alien property, the government both from a legislative and administrative standpoint gave clear indications of its intentions to ultimately return seized property to the former owners and thus to comply with long established international usage. As a preliminary to such return, the seized property together with increments thereon was placed in separate trusts of the respective claimants when identified as their property. This procedure is set forth at some length in *Starchler* v. *Sutherland, et al.*, 19 F. (2d) 999 (E. D. N. Y. 1927), and footnotes thereto.

The fact that the respondent's property was at no time confiscated by the Custodian but at most the ultimate dis-

position thereof was held in abeyance was recognized in the case of *Chemische Fabrik von Heyden Aktiengesellschaft* v. *Tait*, 64 F. (2d) 295 (C. C. A. 4th 1933), *certiorari* denied October 9, 1933, 54 S. Ct. 65. This case involved a suit to recover income and profits taxes assessed against the plaintiff corporation for the year 1919. The plaintiff corporation owned substantially all of the stock of a New Jersey corporation which had been seized by the Alien Property Custodian in 1918 and sold by him in 1919. The tax was computed under Sec. 24(b) of the Trading with the Enemy Act upon the excess of the net proceeds of the sale over the value of the stock on March 1, 1913. The balance of the funds, less 22 per cent, thereof, was paid to the plaintiff corporation by the Alien Property Custodian in 1929 under the Settlement of War Claims Act of 1928. The plaintiff contended that no income tax could be lawfully imposed on this fund, because the plaintiff was an alien enemy during the year 1919, and then had no interest whatever in the property, which was absolutely owned by the United States and, therefore, not subject to tax. The court, in affirming the decision of the District Court, upheld the payment of these taxes. The opinion of the Circuit Court of Appeals was based upon the idea that some property interest remained in the plaintiff, even though the Alien Property Custodian had seized this property in 1918. The language of the District Court, 58 F. (2d) 814, at page 818, is even clearer on this point:

> "It is clear that the plaintiff's property was not absolutely confiscated while held by the Alien Property Custodian. It is true that it had no right or title therein which he could then enforce until authority was given by the further act of Congress, but the substantial situation in expectation was that its rights would probably be restored in some form or to some extent when it was determined by Congress what disposition should finally be made of the property."

The fact that the Settlement of War Claims Act of 1928 and the Winslow Act of 1923 merely determined what had theretofore been an undetermined right of the respondent to the funds in question, and did not constitute a "gift" of that property by Congress to the respondent is also established by the case of *Commissioner of Internal Revenue v. Stearns*, 65 F. (2d) 371 (C. C. A. 2d, 1933), *certiorari* denied October 16, 1933, 54 S. Ct. 90. There the Alien Property Custodian on January 3, 1918, had seized property belonging to one Hieronymus, the taxpayer's testator who was a German citizen and who died on December 23, 1918. The property was returned to Stearns, the administrator c. t. a. of the estate of Hieronymus towards the end of 1928. The question was whether the tax "base" for the purpose of determining gain or loss in the event of sale should be fixed as of the date of the return of the property or as of the date of the death of the former owner. Had not the property been seized by the Custodian the law would have required it to be fixed as of the date of death. Stearns contended it should be fixed as of the date of the return of the property. The Circuit Court of Appeals, holding otherwise, stated as follows at page 374:

> "There remains the question of the proper time at which to fix the 'base'. Had the Alien Property Custodian not intervened, the second sentence of section 113 (a) (5), Revenue Act 1928, 26 U. S. C. A. § 2113 (a) (5), would have fixed it as of December, 1918, when the testator died. But the property was already in the Custodian's possession, seized by him nearly a year before. If the seizure had been a confiscation, and the return by Congress a cession back of property of the United States, Stearns, who as administrator was 'the decedent's estate', would have acquired nothing from the 'decedent'; the property would have come from the United States. However, the seizure was not a confiscation. True, the power to seize rested upon the constitutional power of Congress to make 'captures on land and water', clause 11, § 8, art. 1, U. S. Constitution; Stoehr v. Wallace, 255 U. S. 239, 242, 41 S. Ct.

293, 65 L. Ed. 604. But Congress was not bound to go the whole way; it might sequester without confiscating. The frame of the act did indeed leave the meaning somewhat uncertain. Apparently seizure changed 'title'; it was the substitute for the voluntary act by which the property might be 'conveyed, transferred, assigned, delivered, or paid over'. Section 7 (c), Trading with the Enemy Act, as amended by Act Nov. 4, 1918 (50 U. S. C. A. Appendix, § 7 (c). The Custodian had the powers of 'a common-law trustee', § 12, as amended by Act March 28, 1918, § 1 (50 U. S. C. A. Appendix § 12), which cannot without undue strain be supposed to go without the legal title on which such powers ordinarily depend. But even though we grant so much, the beneficial interest need not pass, and section 12 itself shows that there was no purpose at the time that it should; for it was enacted that all enemy claims to 'property received and held * * * shall be settled as Congress shall direct'. No doubt the power to confiscate was held in reserve, but it was not exercised and might never be. In fact it never was, except in small part. That this was the general intent, the reports of the two Houses amply disclose. House Reports, 83; Senate Reports, 113; 65th Congress; 1st Session. Such was the general understanding. 'Post-War International Law', John Bassett Moore, 27 Col. L. Rev. 400, 408. The contrary would have violated international usage of at least one hundred years."

The decision of this Court in the case of *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1 (1926), is sometimes cited in support of the contention that the property seized under the Trading with the Enemy Act was confiscated. We do not believe this to be the intent of that decision, nor do we believe that counsel for petitioners in this case so contend, although they refer to the *Chemical Foundation* case in their brief, for only recently before this Court in a brief for the respondent in opposition to the petition for writ of *certiorari* in the case of *Stearns* v. *Helvering*, No. 381, October Term 1933, referred to and quoted from above, the Solicitor General, in referring to the question whether

or not the property involved in that case had been acquired as of the date of death of the alien enemy owner or when it became releasable in 1928, stated as follows at pages 5 and 6:

> "* * * Petitioner argues that it was acquired from the Alien Property Custodian and therefore comes within the third sentence of Section 113(a) (5) which refers to all other cases than those covered by the first two sentences 'if the property was acquired either by will or by intestacy.' (Pet. 8) We think it clear that the property was not acquired from the Alien Property Custodian or from the United States. As pointed out by the court below, the seizure by the United States was not a confiscation. The beneficial interest was not taken by the United States and it never was the intention of the Government to confiscate property of enemy aliens. The seizure was no more than a conservation to protect the property, *pendente bello*. Probate and administration in the meantime were forbidden and control and enjoyment were suspended. But the Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (U. S. C. Ann., Title 50, Appendix, Sec. 9 (d) and (g)), itself recognized that property in the Custodian's possession should, upon the enemy's death, devolve as though it had not been seized."

The report of the Committee on Finance of the Senate (70th Congress, First Session, Report No. 273)[2] reporting the Settlement of War Claims Act of 1928, throws much light on this where at pages 12-13 it is said:

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The

[2] The quoted portion of this report closely follows the similar report of the Committee on Ways and Means, dated December 15, 1927, pages 5 and 6.

amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner', and in the so-called Chemical Foundation case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.

"It is to be noted, however, that even if the property should be held to have been confiscated (under the dictum of this decision), in spite of the clear intent of Congress to the contrary, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the original owner but declare it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000 of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the Chemical Foundation case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation.

"It is fair to say that the primary reason for not returning all the alien property at the time of the adoption of the Winslow Act was that Congress was under a duty to retain sufficient property as security until the German Government should make adequate provision for the settlement of the claims of American nationals against Germany and its nationals."

Other sections of the Trading with the Enemy Act incorporated by the War Claims Act show how completely the government divorced itself from any interest in the seized property. By Sec. 30, added to the Trading with the Enemy Act by Sec. 15 of the War Claims Act, it is provided that any property returnable under Sec. 9(b) or (n) of the Trading with the Enemy Act, which includes property of former enemies, shall be subject to attachment. By Sec. 24(b), added to the Trading with the Enemy Act by Sec. 18 of the War Claims Act, it is provided that income, war-profits, excess profits, or estate taxes imposed by any act of Congress shall be computed as if the property had not been seized by the Custodian but had been held all the time by the aliens. By Sec. 9(m), added to the Trading with the Enemy Act by Sec. 14 of the War Claims Act, it is provided that claimants of designated classes before receiving their property must "consent to a postponement of the return of an amount equal to 20 per centum" thereof, the amount so deducted to "be returned to the persons entitled thereto as provided in subsection (f) of section 25". The latter subsection fixed the relative position of payment of the 20 per cent amounts out of German reparations. By Sec. 25(e), added to the Trading with the Enemy Act by Sec. 10 of the War Claims Act, the Secretary of the Treasury was directed to issue to the Custodian 5 per cent interest bearing certificates representing such 20 per cent deductions and also non-interest bearing certificates representing the claimants' interest in the so-called unallocated interest fund, which included accumulated interest derived prior to March 4, 1923, from invested cash of former enemies as to which it had been formerly held former enemies had no right of recovery. By Sec. 25(d), added to the Trading with the Enemy Act by Sec. 10 of the War Claims Act, it is provided that unclaimed property or property claimed without acceptable proof of ownership shall be held to be owned by the German Gov-

ernment and the amount thereof credited upon the final payment due by the German Government to the United States on account of the awards of the Mixed Claims Commission to various claimants. Thus, in no event has the United States Government an interest in the property herein claimed by the respondent. This was clearly conceded in the court below, where in the brief of the present petitioners it was stated at pages 29 and 30:

> "If, upon the final winding up of the Custodian's office, it should appear that the aggregate amount deducted from each trust exceed the actual expenditures of his office in administering said property the balance will be returned pro rata to the several trusts and distributed to the owners thereof. Thus only the *actual* cost of administering said property will have been met by the charges imposed upon such property pursuant to the legislative authority given the Alien Property Custodian by Congress."

It is clear, therefore, that after the enactment of the War Claims Act the Custodian no longer held the respondent's property for the United States, but only held it for the respondent. He and the Treasurer of the United States are now being sued as the holders of the respondent's property for property which under the law should have been returned and has not been returned. They are not being sued as agents of the United States.[2]

The rule is well settled, by decisions of this Court, that

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[2] In the footnote on page 15 of the petitioner's brief reference is made to the fact that upon the substitution of the new Custodian and Treasurer they were not sued individually. That is unimportant for while they did not make the wrongful and illegal deductions they hold or purport to hold the respondent's property as Custodian and Treasurer, respectively, such titles being descriptive but not being in the least determinative of whether or not this is a suit against the United States. The same situation prevailed in *Houston* v. *Ormes*, *infra*, where David F. Houston and John Burke were properly sued as Secretary of the Treasury and Treasurer of the United States, respectively. That suit was held not to be one against the United States.

when an officer of the government holds property which has been appropriated or set aside for another, a suit against such officer by the person entitled to such property is not a suit against the United States. Thus, in *Houston* v. *Ormes*, 252 U. S. 469 (1920), a suit was instituted against the Secretary of the Treasury and the Treasurer of the United States to establish an equitable lien for attorneys' fees upon a fund appropriated by Congress to pay a claim which had been found by the Court of Claims to be due to one Sanders. The money was in the United States Treasury. The contention of the Secretary of the Treasury and the Treasurer, that the suit was in effect one against the United States, was denied. The Court said at page 472:

> "But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the Government. So it has been declared by this court in many cases relating to state officers. * * *"

To the same effect is the case of *Orinoco Co. Ltd.* v. *Orinoco Iron Co.*, 296 Fed. 965 (App. D. C. 1924). There Orinoco Iron Co. sued to establish an equitable claim to money which had been deposited in the United States Treasury under an award made pursuant to an agreement between the United States and Venezuela, settling claims of Orinoco Co. Ltd. against Venezuela. The plaintiff also sought to enjoin the Secretary of the Treasury and the Treasurer of the United States from paying this money to Orinoco Co. Ltd. The contention that the suit was against the United States was expressly overruled by the Court. See also *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121 (1924).

In the case of *Fischer* v. *Palmer*, 259 Fed. 355 (M. D. Pa.

1919), the Custodian had taken possession of a corporation and the plaintiff's shares of stock therein pursuant to the Trading with the Enemy Act. The plaintiff sued to enjoin the Custodian from selling the assets of the corporation. The contention that the suit was against the United States was overruled by the court. Referring to the Alien Property Custodian, it said, at page 357:

> "The acts committed and threatened by him, as alleged by complainant, were done under right or color of authority of his office, and whether he exceeded his authority or acted without authority as such officer is the question presented by the bill. While it may not be regarded as a suit against the United States, in the light of the distinguishing case of Phila. Co. v. Stimson, Secretary of War, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, yet being a challenge of his authority to do the things of which complaint is made, it may be maintained, as was done in that case, against the officer of the government, provided this court of this jurisdiction has power to entertain it."

In the case of *Henkels* v. *Sutherland, et al.*, 271 U. S. 298 (1926), Henkels, an American citizen, had a million and a half dollars' worth of stock of a textile company seized by the Alien Property Custodian, who mistakenly thought Henkels was an enemy. The Custodian sold the stock, and invested the proceeds in United States bonds. Henkels sued the Custodian (Miller) and the Treasurer of the United States under §9 of the Trading with the Enemy Act for the return of the proceeds plus the income therefrom both before and after conversion into United States bonds. He was allowed to recover the proceeds and income from the stock before it was converted, but was denied the right to recover income from the United States bonds. He appealed to the Circuit Court of Appeals, which affirmed the decree denying him the income derived from the United States bonds, on the ground that no suit could be maintained against the United States for income on its own bonds. He

appealed to the Supreme Court of the United States, which held that Henkels was entitled to his proportionate share of all the interest earned on moneys invested in United States bonds with which the proceeds of his stock had been commingled. The Court said at page 301:

> "The Government cannot be sued without its consent, and accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are to be held, for the account of the Alien Property Custodian.
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> "With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit, *White* v. *Mechanics' Securities Corporation*, 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen. Whether the Government shall pay interest upon its obligations depends upon Congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.
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> "The Government contends that *Angarica* v. *Bayard*, 127 U. S. 251, is to the contrary, and the court below so held. In that case, the suit was for interest or income realized upon the amount of an award in favor of Angarica paid by the Spanish government to the United States. This court, in denying the right of recovery, applied the general rule of immunity from interest, saying (pp. 259-260) that the claim 'is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the

money.' Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment."

Likewise in the case of *Abbott* v. *Sutherland, et al.*, decided in 1927 by the Supreme Court of the District of Columbia in Equity No. 46,434, without reported opinion, it was held that a neutral alien, in this instance a German who became a Pole, might recover such interest. These cases negative the petitioners' conclusion that all suits against the Alien Property Custodian are automatically in effect suits against the United States, for they plainly indicate that, where the Treasurer or Custodian receive and hold actual funds, suits against them for such funds are not suits against the United States.

(b) *The United States has no interest in this action.* As has already been pointed out, the government has relinquished all right, title and interest in and to the moneys the return of which to the respondent has been authorized by Congress. Consequently, the government having parted with whatever interest it had in the property can not revest in itself any interest without a direct reseizure. In the absence of a state of war there would be no authorization for a reseizure. The holding by this Court that the arbitrary deductions made by the Custodian in respect of the moneys returned to the respondent did not truly repre-

sent the "necessary expenses" in administering the property as required by the statute, simply means that each estate is required to bear its own expenses. That after all is eminently the fairest method, and the statute has been held to so prescribe.

The rule is settled that where the United States has no interest in an action, it cannot be considered as a party thereto. Thus, in the *Orinoco* case *supra*, the Court of Appeals stated among other things at p. 972, as follows:

> "The iron company is not seeking in this suit to recover anything from the United States. It is conceded, and properly so, that the money in question is held in the treasury as a trust fund. The government has no claim to it and it makes none. No matter what the outcome of the suit might be, the government would receive none of the fund. For this reason the suit is not against the United States, as argued by the appellants."

It seems clear, therefore, the government has no legal or equitable interest whatever in the outcome of this case.

(c) *The deductions have not been made by the United States nor does the respondent so allege in its bill, as amended.* This action is based on the premise that the deductions in the manner made were not authorized by any act of Congress, and consequently it is entitled to recover the amount thereof subject to proof by the Custodian as to actual necessary charges incurred, if any. The respondent contends, and the *Escher* case supports such contention, that in making the deductions the Custodian acted entirely beyond the scope of his authority, as contained in the present Section 24(a) of the Trading with the Enemy Act. It is well settled that where an officer of the government acts beyond the constitutional scope of his authority, he cannot hide behind the cloak of the United States. *United States* v. *Lee*, 106 U. S. 196 (1882); *Goltra* v. *Weeks*, 271 U. S. 536

(1923); *Philadelphia Co.* v. *Stimson*, 123 U. S. 605 (1911). These cases are discussed *infra*.

The reasons which we have considered, it is submitted, definitely control the present case; a finding that any one of them is applicable in this instance will, we believe, necessitate the conclusion that this action is not an action against the United States.

2. EVEN IF THIS SUIT BE CONSTRUED TO BE IN EFFECT ONE AGAINST THE UNITED STATES, THE INDEPENDENT OFFICES APPROPRIATION ACT FOR 1935 CANNOT LAWFULLY PROHIBIT IT, AS IT WOULD RESULT IN THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE TAKING THEREOF FOR PUBLIC USE WITHOUT JUST COMPENSATION.

As shown above, long prior to the enactment of the Independent Offices Appropriation Act for 1935, the respondent was possessed of a definite and well-defined property right in and to all moneys, to the return of which the respondent was entitled under the Winslow Act of 1923 and the War Claims Act of 1928. These moneys include, as has been pointed out, the moneys in excess of "necessary expenses" unlawfully withheld by the Custodian. The Winslow Act of 1923 and the War Claims Act of 1928 merely determined the respondent's interest in the property which had been sequestered under the Trading with the Enemy Act as adopted in 1917. As also pointed out above, the respondent always retained an equitable title in the property, which interest was clearly not confiscated by the United States. At most, that title was in abeyance pending the exercise of the power resting in Congress, so that upon the enactment of the Winslow Act of 1923 and the War Claims Act of 1928, the respondent obtained the definite and unequivocal right to receive back that property upon complying with certain steps with which respondent has in every respect complied.

The Independent Offices Appropriation Act for 1935 now boldly purports to deprive the respondent of this property

right without due process of law, and seeks to take the respondent's property for public use without just compensation. Any such action on the part of the United States runs afoul of the Fifth Amendment to the Constitution. Therefore, even if this is to be deemed in effect a suit against the United States, the suit may be maintained and judgment rendered despite the attempted prohibition contained in the Independent Offices Appropriation Act for 1935, for that act attempts to deprive the respondent of its property and take it away without just compensation. In such a case, where a property right is involved, suits may be maintained, if not brought against the sovereign by name, even though in effect against the sovereign and though the sovereign has never consented to be sued. The leading case setting forth this principle is the well-known case of *United States* v. *Lee*, 106 U. S. 196 (1882). An ejectment suit was brought by the alleged owners of certain property known as "Arlington", in the State of Virginia, against certain commissioners of the United States, who had purchased the property at a tax sale and were holding the same for the United States. An attempt was made in that case to set up the defense that the suit was in effect one against the United States, and that as the United States had not consented to be sued, the suit might not be maintained. This Court held that the exemption from being sued where property rights were involved was limited to suits against the United States directly and by name, and that this exemption from suit could not be successfully pleaded in favor of officers and agents of the United States when sued by private persons for property in their possession as such officers. In the course of its opinion this Court states at pages 220, 221, as follows:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of that law and are bound to obey it * * *.

> "It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed."

The rule of this case has been followed on numerous occasions. *Goltra* v. *Weeks*, 271 U. S. 516 (1926); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1911). In the case of *Goltra* v. *Weeks*, *supra*, while holding that the plaintiff below was not entitled to the relief sought because of the terms of his particular contract with the government, the Court nevertheless stated that except for this situation the officers of the United States who took over certain barges might be restrained from perpetrating the acts or threatened acts. In the course of its opinion, the Court said at p. 544:

> "By reason of their illegality, their acts or threatened acts are personal, and derive no validity from their doing them by virtue of their asserted action for the government. The point is fully covered by Philadelphia Co. v. Stimson, 223 U. S. 605."

In the case of *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1911), the complainant owned an island in the Ohio River, around which duly-authorized officers of Pennsylvania had located a harbor line, which by statute was declared to be forever firm and stable. The Secretary of War changed the harbor lines in such a way as to cross the complainant's land within the state harbor line, which had never been, as complainant alleged, part of the navigable waters of the United States. The bill of the complainant averred that the Secretary of War proposed to institute criminal proceedings with heavy penalties against the complainant for its proposed erection of buildings on its own

land. It was objected, on demurrer, that this was a suit against the United States and must be dismissed for lack of its presence as a party. This the Court refused to do. This Court at pages 619 and 620 said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little* v. *Barreme*, 2 Cranch, 170; *United States* v. *Lee*, 106 U. S. 196, 220, 221; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborne* v. *Bank of United States*, 9 Wheat. 738, 843, 868; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643-645. And it is equally applicable to a federal officer acting in excess of his authority, or under an authority not validly conferred. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

At page 16 of the petitioners' brief the proposition is stated that since this suit is one against the United States and relates to property over the disposition of which the United States has absolute, unqualified control, the consent to be sued may be withdrawn at any time as it was settled that a suit against the sovereign is a matter of grace. Five cases are cited in support of this proposition, which, indeed, has a double aspect. In its first aspect it presupposes that the United States at the time this suit was brought had absolute, unqualified control of the seized property. This, we have shown before, is not correct. For the second aspect of the proposition that this is a suit against the United States and may be withdrawn at any time as a suit against the sovereign is a matter of grace, the cases *Beers* v. *Arkansas*, 20 How. 527 (1858); *De Groot* v. *United States*, 5 Wall. 419 (1867), 432; and *Chase* v. *United States*, 50 C. Cls. 293, 306-314 (1915), are apparently cited. The other two cases, namely, *Sutherland* v. *Norris*, 24 F. (2d) 414 (C. C. A. 3d, February 1928), *certiorari* denied, 277 U. S. 602, and *Kogler* v. *Miller*, 288 Fed. 806 (C. C. A. 3d, 1923), are not directly applicable to this proposition, for they involve the circumstances which we have pointed out above with respect to the *Banco Mexicano* and *von Bruning* cases, *supra*. The *Chase* case involves principally the removal of a remedy by a statute to recover on a contract, and not the removal of any vested property right; the court so pointed out at p. 306 of its opinion. The remaining cases involve contracts with the sovereign, and it will be noted in each instance that the suit is brought against the sovereign in its own name. Such cases are easily distinguished from the long line of cases into which the instant case fits, where suits are brought not against the sovereign by name on a contract, but are brought against officers of the sovereign with respect to the unlawful deprivation or taking of property.

Many other cases, of course, might have been cited for the proposition that the sovereign cannot be sued without

its consent. All such cases, however, rest (1) upon the fact that the sovereign is sued by name; (2) upon the fact that, though the sovereign be not sued by name its officer represents the sovereign and a contract is sought to be in effect enforced against the sovereign; or (3) upon the fact that the suit is one in effect against a state by a citizen and is barred by the Eleventh Amendment to the Constitution. In the first case, of course, it is considered by the courts that the sovereign itself can do no wrong. If its agencies proceed to act for it in an unconstitutional manner, their act is not that of the sovereign, for no rights or duties or protections arise from the commission of an unconstitutional act. In the second type of cases, and the one most frequently found in discussions of this proposition, a contract right is involved. For the courts to undertake to enforce a contract, as was intimated in *Louisiana* v. *Jumel*, 107 U. S. 711 (1883), might involve taking over the political functioning of the state. Even so, collaterally at least, or where the sovereign itself brings suit, the contract will be recognized by the courts in spite of its attempted unconstitutional impairment. *Ex Parte Ayers*, 123 U. S. 443 (1887); *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885). And in the third class of cases the courts will not permit a suit against a state, positively forbidden by the Eleventh Amendment, to be brought by the device of suing the officer. *Ex Parte Ayers, supra.*

With such decisions the respondent cannot take issue. It can, and does, take issue with any statement of the rule which does not distinguish the above classes of cases from an entirely different class, such as that in which the instant case is found. Here we are dealing with a situation where the definite and fundamental protection of property provided by the Fifth Amendment is being sought to be made ineffective by raising the rule that the sovereign may not be sued without its consent. This Court has, in the *Lee*, the *Goltra*, and the *Philadelphia Co.* cases, shown that the judicial power can meet such threat.

There is no question but that the respondent is entitled to the protection of the Fifth Amendment to the Constitution. *Russian Fleet* v. *United States*, 282 U. S. 481, 488 (1930).

a. The Independent Offices Appropriation Act for 1935, in so far as it attempts to preclude the maintenance of this action and to ratify the unlawful withholding by the Alien Property Custodian of moneys in excess of "necessary expenses," is in contravention of the Fifth Amendment of the Constitution of the United States.

The Independent Offices Appropriation Act for 1935 purports to accomplish one result through two different though closely-related approaches. It first prohibits the maintenance of suits and the rendition of judgment by attempting to withdraw the remedy; in the second place, it attempts to ratify the prior erroneous deductions. In both aspects it deprives the respondent of its property and takes it away. As to the first aspect whether this be a suit against the sovereign or not, the sovereign having once consented to this type of suit cannot now withdraw; for in so doing it deprives the respondent of a property right. *United States* v. *Nuestra Señora de Regla*, 108 U. S. 92 (1883). We submit, therefore, that it makes no difference if the consent were originally given by statute or by the affirmative act of the sovereign in instituting proceedings. In neither case may it later withdraw consent where to do so would interfere with property rights.

That the Act in question is unconstitutional is clearly settled by the case of *Coombes* v. *Getz*, 285 U. S. 434 (1932). There the California constitution contained a section providing that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. Another section reserved in the legislature the power to alter or repeal any future laws concerning corporations. Plaintiffs, who had contracted with

the corporation while these provisions were in force, brought suit to enforce the constitutional liability against the defendant, a director of the corporation, for money misappropriated by officers of the corporation. While this action was pending, the legislature repealed the section making the directors liable. This Court held that the statute repealing this section was unconstitutional as to the plaintiffs on the ground that it contravened both the contract impairment clause and the due process clause of the United States Constitution. The opinion of the Court was delivered by Mr. Justice Sutherland and concurred in by Mr. Chief Justice Hughes, Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Roberts. Mr. Justice Sutherland succinctly stated as follows at page 442:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Pritchard* v. *Norton*, 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef*, 2 Wall. 10; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ochiltree* v. *Railroad Co.*, 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 390, *et seq.*; *Knickerbocker Trust Co.* v. *Myers*, 133 Fed. 764, 767."

And concluded at page 448:

> "It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma*, and cases cited in connection

> therewith, *supra*) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution."

While Mr. Justice Cardozo, joined by Mr. Justice Brandeis and Mr. Justice Stone, dissented from the opinion of the majority of the Court, the dissenting opinion of Mr. Justice Cardozo strengthens rather than detracts from the present case. That opinion was based upon the provision in the California constitution which permitted the legislature to modify or repeal any statute with respect to corporations at any time. There is a strong implication in the dissenting opinion that without this provision the repeal of the statute would have been unconstitutional as to the plaintiffs. It was stated as follows at page 450:

> "I add the assumption that the State of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it was indefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, Art. 1, sec. 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way (*Hawthorne* v. *Calef*, 2 Wall. 10; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ettor* v. *Tacoma*, 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338). The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. * * *"

See also the case of *Ettor* v. *Tacoma*, 228 U. S. 148 (1912).

Neither that portion of the Trading with the Enemy Act which provided for the return of property to former enemies nor any other portion of the Act contains any provision expressly or impliedly reserving the right to Congress to modify or repeal the provisions restoring property rights

to former enemies. The right of the respondent to receive the moneys sued for in this case, upon compliance with certain conditions which have been met, is an absolute and vested one. The respondent's interest is not in any sense defeasible. The attempt to preclude the respondent from maintaining its action to recover such property is clearly a deprivation of its property without due process of law.

b. The attempted ratification of the deductions made by the Alien Property Custodian in excess of "necessary expenses" did not relate back so as to give authority to such deductions as of the time they were made.

The petitioners' brief (pages 17 and 18) states that where "the power over the subject matter is as complete and unqualified as it is here", the attempted ratification "relates back, giving authority to the deductions as of the time they were made". The respondent fully admits that at the date of sequestration of the seized property the power of Congress over such property was absolute. The tacit assumption by the petitioners, whether intentional or not, that this power continues, is clearly erroneous. Congress relinquished its "complete and unqualified" power over the property by the Winslow Act of 1923 and the Settlement of War Claims Act of 1928. The petitioners' brief cites two cases to support the contention that the attempted ratification of these deductions relates back. They are *United States* v. *Heinszen & Co.*, 206 U. S. 370 (1907), and *Street* v. *United States*, 133 U. S. 299 (1890). Neither of these cases is applicable to the present case. The *Heinszen* case involved the ratification of the collection of a tax which had been collected without authority of law. The ratification there deprived no one of any vested right to property. This Court on more than one occasion had held that Congress had the right to impose a tax in respect of past benefits. The so-called ratification in this case would clearly have been legal if Congress had purported to levy the tax for the first time, as pointed out by Mr. Justice

Holmes in the more recent case of *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338 (1922), (*infra*). The mere fact that Congress called it a ratification did not make its power with respect to the tax any the less complete at the date of the passage of the ratification act. In the *Street* case the President, under an act of Congress, had discharged many officers of the army. Street, a discharged officer, claimed that his discharge was improper because it was made the day after the expiration of the period within which the President was authorized to make the discharge order. Congress had subsequently passed statutes which approved at least by inference the execution of the presidential order. This case is fairly distinguishable from the present case because the order clearly terminated Street's service. At the date of such termination, Street certainly had no vested property right to continue in such service.

The rule is well settled by decisions of this Court that where the attempted ratification would deprive a party of a vested property right such ratification does not relate back. This was conclusively decided in *Forbes Pioneer Boat Line* v. *Commissioners*, *supra*. There the plaintiff sued to recover tolls which had been unlawfully collected for passage through the lock of a canal supervised and controlled by the Board of Commissioners. After the Supreme Court of Florida had decided, on demurrer to the Boat Line's declaration, that the tolls had been improperly collected and withheld, the Florida Legislature passed an act ratifying the past collection of such tolls. This act was pleaded. The plaintiff demurred, setting up among other things, the Fourteenth Amendment of the Constitution of the United States. This Court speaking through Mr. Justice Holmes distinguished the case from that of *United States* v. *Heinszen & Co.*, (*supra*), on the grounds heretofore discussed, and expressly held that the collection of the tolls could not be ratified by the legislature of Florida. The Court stated at pages 339-340:

"Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. * * * But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. *Bird* v. *Brown*, 4 Exch. 786, 799. If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

* * * * * * * * *

"Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the Court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot."

The respondent's right in this case is none the less a property right than that of the plaintiff in the foregoing case. A sum of money was unlawfully withheld from the plaintiff in that case. That is the fact in this case. It is clear, therefore, that the attempted ratification in this case did not relate back so as to validate the deductions made by the Alien Property Custodian.

Accordingly, even if this suit be deemed to be a suit

against the United States, it can not be prohibited because it is not brought against the United States by name and it involves a deprivation of property without due process of law and a taking thereof for public use without just compensation.

Conclusion.

We, therefore, respectfully submit that the decision of the Court of Appeals, District of Columbia, should be affirmed.

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Appendix A.

The Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. L. 411, as amended Mar. 28, 1918, c. 28, 40 Stat. L. 460; July 11, 1919, c. 6, 41 Stat. L. 35; June 5, 1920, c. 241, 41 Stat. L. 977; and by the Winslow Act of Mar. 4, 1923, c. 285, 42 Stat. L. 1511, 1576, and the Settlement of War Claims Act of 1928, Mar. 10, 1928, c. 167, 45 Stat. L. 254, provides in part:

Section 9 provides in part as follows:

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for

the district in which such claimant resides, or, if a corporation, where it has its principle place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was— * * *

(14) An individual who at such time was a citizen or subject of Germany or who, at the time of the return of any money or other property, is a citizen or subject of Germany or is not a citizen or subject of any nation, State, or free city, and that the written consent provided for in subsection (m) has been filed; * * *

(c) Any person whose money or other property the President is authorized to return under the provisions

of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof. * * *

(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return), as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25. Such amount shall be deducted from the money to be returned to such person, so far as possible, and the balance shall be deducted from the proceeds of the sale of so much of the property as may be necessary, unless such person pays the balance to the Alien Property Custodian, except that no property shall be so sold prior to the expiration of six years from the date of the enactment of the Settlement of War Claims Act of 1928 without the consent of the person entitled thereto. The amounts so deducted shall be returned to the persons entitled thereto as provided in subsection (f) of section 25. The sale of any such property shall be made in accordance with the provisions of section 12, except that the provisions of such section relating to sales or resales to, or for the benefit of, citizens of the United States shall not be applicable. If such aggregate value of the money or other property to be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) is less than $2,000, then the written consent shall not be required and the money or other property shall be returned in full without the temporary retention and investment of 20 per centum thereof.

(n) In the case of property consisting of stock or other interest in any corporation, association, company, or trust, or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds or by other certificates of interest therein or indebtedness thereof, or consisting of dividends or interest or other accruals thereon, where the right, title, and interest in the property (but not the actual certificate or bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, if the President determines that the owner thereof or of any interest therein has acquired such ownership by assignment, transfer, or sale of such certificate or bond or other certificate of interest or indebtedness, (it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him) and that the written consent provided for in subsection (m) has been filed, then the President may make in respect of such property an order of the same character, upon the same conditions, and with the same effect, as in cases provided for in subsection (b), including the benefits of subsection (c).

Section 12 of the Trading with the Enemy Act, amended as above referred to, is as follows:

* * * * * * * * *

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, * * *.

* * * * * * * * *

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be set-

tled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court:

* * *

Section 24 of the Trading with the Enemy Act, amended as above referred to, is as follows:

(a) The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

(b) In the case of income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, the amount thereof shall, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, be computed in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid, as far as practicable, in accordance with subsection (a) of this section. Pend-

ing final determination of the tax liability the Alien Property Custodian is authorized to return, in accordance with the provisions of this Act, money or other property in any trust in such amounts as may be determined, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, to be consistent with the prompt payment of the full amount of the internal-revenue taxes.

* * * * * * * * *

(d) Any property sold or exchanged by the Alien Property Custodian (whether before or after the date of the enactment of the Settlement of War Claims Act of 1928) shall be considered as having been compulsorily or involuntarily converted, within the meaning of the income, excess-profits, and war-profits tax laws and regulations; and the provisions of such laws and regulations relating to such a conversion shall (under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury) apply in the case of the proceeds of such sale or exchange. For the purpose of determining whether the proceeds of such conversion have been expended within such time as will entitle the taxpayer to the benefits of such laws and regulations relating to such a conversion, the date of the return of the proceeds to the person entitled thereto shall be considered as the date of the conversion.

(e) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

(f) The benefits of subsections (c), (d), and (e) shall be extended to the taxpayer if claim therefor is filed

before the expiration of the period of limitations properly applicable thereto, or before the expiration of six months after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is the later. The benefits of subsection (d) shall also be extended to the taxpayer if claim therefor is filed before the expiration of six months after the return of the proceeds.

Section 25 of the Trading with the Enemy Act, amended as above referred to, (added by Section 10 of the Settlement of War Claims Act of 1928) is as follows:

(a) (1) The Alien Property Custodian is authorized and directed to invest, from time to time upon the request of the Secretary of the Treasury, out of the funds held by the Alien Property Custodian or by the Treasurer of the United States for the Alien Property Custodian, an amount not to exceed $40,000,000 in the aggregate, in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of this section.

* * * * * * * * *

(d) The Alien Property Custodian is authorized and directed (after the payment of debts under section 9) to transfer to the Secretary of the Treasury, for deposit in such special deposit account, all money and the proceeds of all property, including all income, dividends, interest, annuities, and earnings accumulated in respect thereof, owned by the German Government or any member of the former ruling family. All money and other property shall be held to be owned by the German Government (1) if no claim thereto has been filed with the Alien Property Custodian prior to the expiration of one year from the date of the enactment of the Settlement of War Claims Act of 1928, or (2) if any claim has been filed before the expiration of such period (whether before or after the enactment of such Act), then if the ownership thereof under any such claim is not established by a decision of the Alien Property Custodian or by suit in court instituted, under section 9, within one year after the decision of the Alien Property Custodian, or after the date of the

enactment of the Settlement of War Claims Act of 1928, whichever date is later. The amounts so transferred under this subsection shall be credited upon the final payment due the United States from the German Government on account of the awards of the Mixed Claims Commission.

(e) The Secretary of the Treasury is authorized and directed to issue to the Alien Property Custodian, upon such terms and conditions and under such regulations as the Secretary of the Treasury may prescribe, one or more participating certificates, bearing interest payable annually (as nearly as may be) at the rate of 5 per centum per annum, as evidence of the investment by the Alien Property Custodian under subsection (a), and one or more non-interest bearing participating certificates, as evidence of the investment by the Alien Property Custodian under subsection (b). All such certificates shall evidence a participating interest, in accordance with, and subject to the priorities of, the provisions of section 4 of the Settlement of War Claims Act of 1928, in the funds in the German special deposit account created by such section, except that—

(1) The United States shall assume no liability, directly or indirectly, for the payment of any such certificates, or of the interest thereon, except out of funds in such special deposit account available therefor, and all such certificates shall so state on their face; and

(2) Such certificates shall not be transferable, except that the Alien Property Custodian may transfer any such participating certificate evidencing the interest of a substantial number of the owners of the money invested, to a trustee duly appointed by such owners.

* * * * * * * * * * *

Section 30 of the Trading with the Enemy Act, amended as above referred to, is as follows:

Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior

to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia, as amended, relating to attachments in suits at law and to attachments for the enforcements of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, of any money or other property held by the Alien Property Custodian or by the Treasurer of the United States.

The Independent Offices Appropriation Act for the fiscal year 1935 (Public No. 141), passed March 28, 1934, provides, in part, as follows:

Subsection (a) of section 24 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following:

No claim shall be filed with the Alien Property Custodian or allowed by him or by the President of the United States, nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, and no allowance of any such claim now pending shall be made, nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, which deduction or deductions on the collection of any income do not exceed the sum of 2 per

centum of such income or which on the return of any moneys or properties or income therefrom, do not exceed the sum of 2 per centum of the aggregate value thereof at the time or times as nearly as may be, of such deduction or deductions, or, for the recovery of any deduction or deductions heretofore or hereafter made by the Alien Property Custodian from money or properties or income therefrom held by him or by the Treasurer of the United States hereunder, for any and all necessary expenses incurred and actually disbursed by the Alien Property Custodian or by any depositary for him in securing the possession, collection or control of any such money or properties or income therefrom, or in protecting or administering the same, as said general or administrative and other expenses and said aggregate value of returned money or properties or income therefrom have been heretofore or shall be hereafter determined by said Alien Property Custodian.

SUPREME COURT OF THE UNITED STATES.

No. 795.—October Term, 1933.

Urey Woodson, as Alien Property Custodian of the United States, and W. A. Julian, as Treasurer of the United States, Petitioners, *vs.* Deutsche Gold und Silber Scheideanstalt Vormals Roessler, a Corporation, Frankfurt a/Main, Germany.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 28, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

April 15, 1931, respondent brought this suit in the supreme court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States. Petitioners are their successors in office and as such have been substituted in their official capacities for the original defendants. Respondent is a corporation organized under the laws of Germany and at the time of the war between the United States and that country was there engaged in the manufacture and sale of chemicals, etc. It owned property in the United States including shares of stock in American corporations doing like business. Another German corporation, Holzverkohlungs-Industrie Aktiengesellschaft, was then similarly engaged and it also owned property in the United States including shares in one of the American corporations. Pursuant to the Trading with the Enemy Act, 40 Stat. 411, the Custodian seized the shares and other property in this country respectively belonging to these alien enemies. In July, 1930, respondent acquired all the assets of the other German corporation.

Section 24 of the Trading with the Enemy Act[1] authorized the Custodian to pay expenses incurred in obtaining and administering property taken and held by him and required payments to be made out of the property in respect of which the expenses

[1]Added by § 2, Act of March 4, 1923, 42 Stat. 1516.

were incurred. The Act of May 16, 1928, 45 Stat. 574, directed that all expenses of the Custodian's office, including his compensation, should be paid from interest and collections of trust funds and other property under his control. Under the Act of March 4, 1923,[2] there was released to each of the German corporations $10,000 of principal and income in the same amount annually thereafter, less one per cent. of the amounts paid between March 4, 1923, and November 1, 1927, and two per cent. of those paid after the date last mentioned. The amount so withheld was $1,400. By the Act of March 10, 1928,[3] the President was authorized to order return of all except 20 per cent. of the principal of money and property to which he should find the claimant entitled. Respondent and the other German corporation filed their claims which in due course were allowed. The Custodian released to them various sums, retaining the required 20 per cent. and other amounts not here material. Of the amounts released he deducted two per cent., $60,346.52. He also retained out of Treasury interest paid upon the proceeds of the seized property $8,142.31. The total of these deductions is $69,888.83; all was taken by the Custodian to cover the general or administrative expenses of his office.

The amended bill alleges, *inter alia*, the facts above stated and prays an accounting and judgment for the amount so withheld by the Custodian. Defendant interposed a motion to dismiss and an answer. The trial court overruled the motion, and on special appeal its decree was affirmed. 68 F. (2d) 391.

March 28, 1934, shortly after this writ was granted, Congress passed an Act[4] containing an amendment to § 24 of the Trading with the Enemy Act which declares: "No claim shall be filed . . . nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, . . . nor judgment entered in

[2] §§ 9 (b) (10), (h) and 23, added by §§ 1 and 2, Act of March 4, 1923, 42 Stat. 1512, 1513, 1515, 1516.

[3] § 9 (b) (16), (m), added by §§ 11 and 14, Act of March 10, 1928, 45 Stat. 270, 272, and § 23, as amended by § 17, Act of March 10, 1928, 45 Stat. 275.

[4] Public No. 141, 73d Congress, 2d Session.

any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, . . . ".

This amendment was intended to forbid, and it is broad enough to cover, the commencement or maintenance of suits such as this. If valid, it requires the decree below to be reversed and the bill to be dismissed. The moneys sued for are a part of proceeds of property that was taken by the Custodian from respondent and the other German corporation. The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct". 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war. It is clear the enemy owners were divested of every right in respect of property taken and held under the Act. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9-11.

The original Act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration. The funds here in question are proceeds which were deducted for that purpose when payments were made from time to time to the enemy owner. As respects property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be

applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses. This is in effect what was done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and in such circumstances does not deprive the respondent of any vested interest.

It follows that the Act of March 28, 1934, infringes no constitutional right of respondent. The decree of the Court of Appeals is reversed and the cause remanded to the Supreme Court of the District of Columbia with directions to that court to dismiss the bill.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.